

No. PD-0552-18

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/28/2019
DEANA WILLIAMSON, CLERK

Ex parte Jordan Bartlett Jones, Appellant

Appeal from Smith County

* * * * *

**STATE'S POST-SUBMISSION NOTICE
OF ADDITIONAL AUTHORITY**

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Ninth Court of Appeals yesterday upheld the constitutionality of TEX. PENAL CODE § 21.16 in an unpublished opinion.¹ Its analysis, which was fairly straightforward, included the following observations/conclusions:

- Recognizing its duty to construe statutes so as to avoid constitutional infirmities, it held that the Legislature “narrowly defined the type of conduct that is prohibited and limited it to matters that were intended to be private and are not of public concern.”²
- The court assumed without deciding that strict scrutiny applied and concluded the statute is narrowly tailored to achieve a compelling interest.³
- The court did not need to decide whether “underinclusivity” is a valid consideration; “even if a statute is hypothetically underinclusive because it does not address all types of conduct that might produce the same evil to which the statute is directed, it does not make the statute unconstitutional or mean the State’s interest is not compelling.”⁴
- Regarding overbreadth, the court concluded that the statute “does not prohibit a substantial amount of protected expression.”⁵

¹ *Ex parte David Lopez*, No. 09-17-00393-CR (March 27, 2019) (not designated for publication). That case had been pending for over a year.

² Slip op. at 13.

³ Slip op. at 14.

⁴ Slip op. at 10-11.

⁵ Slip op. at 12.

- In support, it explained that it “fail[ed] to see” how the statute threatens the free and robust debate of public issues or interferes with a meaningful dialogue of ideas, which is the core concern of the First Amendment.⁶

Respectfully submitted,

/s/ John R. Messinger

JOHN R. MESSINGER

Assistant State Prosecuting Attorney

Bar I.D. No. 24053705

P.O. Box 13046

Austin, Texas 78711

information@spa.texas.gov

512/463-1660 (Telephone)

512/463-5724 (Fax)

⁶ Slip op. at 12.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of March, 2019, a true and correct copy of the State's Post-Submission Notice of Additional Authority has been eFiled or e-mailed to the following:

Michael J. West
Smith County Assistant District Attorney
4th Floor, Courthouse
100 North Broadway
Tyler, Texas 75702
mwest@smith-county.com

Mark W. Bennett
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
MB@ivi3.com

Courtesy Copy Provided:
Texas Solicitor General Kyle D. Hawkins
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711
Kyle.Hawkins@oag.texas.gov
andrew.davis@oag.texas.gov

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney